



John E. Hensley, Chairman
Michael C. Palmer
J.K. Sasaki
Arlo E. Smith

STATE OF CALIFORNIA
GAMBLING CONTROL COMMISSION

2399 Gateway Oaks Drive, Suite 100
Sacramento, CA 95833

P.O. Box 526013
Sacramento, CA 95852-6013

(916) 263-0700
(916) 263-0452 FAX

April 14, 2003

Mark S. Luciano
Outpost Casino Sports Bar and Restaurant
2251 San Ramon Valley Drive
San Ramon, CA 94583

RE: In the Matter of the Statement of Issues and Termination of Provisional License
Against: MARK S. LUCIANO, Outpost Casino Sports Bar and Restaurant
(OAH No. 2002040146)

Dear Mr. Luciano:

The California Gambling Control Commission has taken action with respect to the proposed decision of the Administrative Law Judge in the above matter, which was received by the Commission on January 8, 2003. In accordance with a procedure authorized by Government Code section 11526, the Commission unanimously voted to reject that proposed decision and decide the case upon the record with or without additional evidence in accordance with Government Code section 11517(b)(2)(E).

Please contact the undersigned (916-263-0459) as soon as possible to arrange for a Commission hearing in this matter and to determine with Commission staff whether a transcript of the prior hearing will be necessary or whether the matter may be decided upon an agreed statement of facts. The Commission may also elect to consider issues pertaining to your qualifications for a state gambling license that were not previously considered by the Administrative Law Judge.

Additionally, it will be necessary for you to clarify whether you presently possess a license issued by the City of San Ramon to operate the Outpost Casino Sports Bar and Restaurant.

Sincerely,

Peter Melnicoe
Commission Counsel

cc: Christopher Lucas, Goforth & Lucas

197

BEFORE THE
CALIFORNIA GAMBLING CONTROL COMMISSION
STATE OF CALIFORNIA

In the Matter of the Statement of Issues and
Termination of Provisional License Against:

MARK S. LUCIANO
Outpost Casino Sports Bar and Restaurant
2251 San Ramon Valley Boulevard
San Ramon, California 94583

Respondent.

Case No. S02-01

OAH No. N2002040146

PROPOSED DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Concord, California on August 5-9 and 12-16, 2002.

Complainant Harlan W. Goodson, Director, Division of Gambling Control, Department of Justice, State of California, was represented by Joel S. Primes, Deputy Attorney General.

Respondent Mark S. Luciano was present and was represented by Christopher R. Lucas, Attorney at Law, Goforth & Lucas, 2300 Clayton Road, Suite 1460, Concord, California 94520.

The record was held open to allow the parties to submit written closing argument. Respondent's brief was received on September 18, 2002 and was marked as Exhibit DD for identification. Complainant's brief was received on October 11, 2002 and was marked as Exhibit 69 for identification.

The matter was deemed submitted on October 18, 2002.

FACTUAL FINDINGS

Gaming Regulation

1. Between 1984 and 1998, regulation of gaming establishments in California was controlled by the Gaming Registration Act (GRA).¹ Under the GRA, an owner or

¹ Former Business and Professions Code section 19800 et seq.

operator of a gaming club was required to obtain a registration from the Office of Gaming Regulation of the California Department of Justice.²

2. Enacted by SB 8,³ the Gambling Control Act (GCA) supplanted the GRA.⁴ SB 8 created the Division of Gambling Control of the California Department of Justice (Division), the California Gambling Control Board (Board) and the California Gambling Control Commission (Commission). Sections 1 through 3 of SB 8 became operative January 1, 1998. Those sections vested initial authority for regulation of the gaming industry in California in the Division and the Board. Upon the occurrence of certain events, sections 4 through 52 of SB 8 would become operative, the Commission would succeed to all powers of the Board, which would be abolished, and specified sections of the GCA would be repealed and replaced with new sections providing for operation of the Commission as the decision-making body for purposes of issuance, revocation and suspension of licenses. The Commission succeeded the Board and began exercising the powers described in sections 4 through 52 of SB 8 effective August 29, 2000.

License History

3. Mark S. Luciano (respondent) is owner of the Outpost Casino Sports Bar and Restaurant (the Outpost), located at 2251 San Ramon Valley Drive, San Ramon.

4. On October 2, 1996, in accordance with applicable provisions of the GRA, the Office of Gaming Registration issued respondent a Conditional Registration Certificate (CRC) to operate the Outpost. The CRC was renewed on October 1, 1997.

5. Under section 62(b)(1) of SB 8, effective January 1, 1998, every person holding a valid registration issued under the GRA was deemed to hold a provisional license under the new GCA pending a determination on an application for a gambling license.⁵ Under section 62(a), "The issuance of a provisional license creates no vested right to the issuance of a state gambling license." Accordingly, on January 1, 1998, respondent was issued a Certificate to Operate allowing him to continue to operate the Outpost through December 31, 1998. On its face, the Certificate to Operate, a provisional license under section 62(b)(1), provided that it "does not create a vested right toward the issuance of a state gambling license." On January 1, 1999, respondent's Certificate to Operate was renewed for another year. Again, the disclaimer that the certificate provided no vested right to a license was included.

² Former Business and Professions Code section 19805(a).

³ Stats. 1997, c. 867.

⁴ Current Business and Professions Code section 19800 et seq.

⁵ See Stats. 1997, c. 897, § 62(e).

6. Respondent filed an application for a state gambling license on February 3, 1999.

7. Respondent's Certificate to Operate was once again renewed for a year on January 1, 2000. The disclaimer was again included.

8. On August 17, 2000, the Division notified respondent that it would recommend denial of his application for a state gambling license. On October 20, 2000, the Division notified respondent that the Attorney General had upheld the recommended denial of his application. On November 14, 2000, the Division served respondent with a cease and desist order. On November 17, 2000, the Division notified respondent that his Certificate to Operate was terminated.

9. Respondent filed a petition for writ of mandate in Sacramento Superior Court challenging the Division's termination of his Certificate to Operate without a hearing. On January 1, 2001, the Division notified respondent that his Certificate to Operate would be extended as the result of a stay issued in the Superior Court. The writ of mandate was granted on February 20, 2001. The cease and desist order was rescinded and the Division was precluded from terminating respondent's provisional license without a due process hearing.

10. On July 17, 2001, the Division again notified respondent that it was recommending denial of his application for a state gambling license. After a pre-denial hearing conducted by complainant, on October 4, 2000 the Division recommended to the Commission that respondent's application be denied.

11. On January 1, 2002, respondent's Certificate to Operate was once again renewed for a year, or until his application was granted or denied. Again, the disclaimer was included.

Burden of Proof

12. Generally, an applicant for a governmental license bears the burden of proving that he meets the requirements for issuance of the license.⁶ However, relying upon section 62(g) of SB 8, respondent maintains that in this proceeding the burden of proof is upon the Division to establish that he is not suitable for a license. Section 62(g), an uncodified provision of SB 8, provides: "Notwithstanding subdivision (a) of Section 19847, there shall be a rebuttable presumption" that everyone who, as of December 31, 1997, held a valid registration issued under the GRA, "is suitable for licensure pursuant to this act." Thus, respondent argues, the burden is on the Division to rebut the presumption of respondent's suitability for licensure.

⁶ See Cal. Administrative Hearing Practice (Cont. Ed. Bar 2d ed. 1997) § 7.53, p.320.

13. Complainant contends that the burden is on respondent because section 62(g) "ceased to exist when the . . . Commission came into effect" and that, therefore, the operative law is Business and Professions Code section 19847A, which provides that, "The burden of proving his or her qualifications to receive a license is on the applicant."⁷ Section 66, another uncodified provision of SB 8, provides that sections 4 through 52 of the act "shall become operative" when the Commission comes into effect. It is complainant's position that section 62, not being one of those specified in section 66 to become operative when the Commission replaced the Board, was thereby repealed when the Commission was created.

14. Contrary to complainant's position, the uncodified provisions of SB 8, sections 62 through 69, were not repealed by operation of section 66 when the Commission was created. While section 66 made sections 4 through 52 operative, it said nothing about the remaining sections of the act. By complainant's reasoning, sections 1 through 3 and 53 through 61 would also have been repealed upon creation of the Commission. The only provisions of the act that were repealed were those that by their own terms provided for repeal and replacement by parallel provisions of sections 4 through 52.

15. Section 62 of SB 8 established a process under which existing registrants under the GRA would be "grandfathered" into the GCA. First, each registrant was deemed to have a provisional license.⁸ Beginning July 1, 1998 the Division would begin summoning provisional license holders to apply for state gambling license.⁹ These provisional license holders would not be required, as part of that application process, to submit information already in possession of the Department of Justice.¹⁰ While a provisional license holder was entitled to a rebuttable presumption of suitability for a license,¹¹ the application could be denied.¹² The rebuttable presumption of section 62(g) was specifically made to be an exception to the general requirement for new applicants, as set forth in Business and Professions Code section 19487/19487A, that the applicant bore the burden of proving his or her qualifications for licensure.

It is therefore clear that the legislature intended that there would be a different application process for existing registrants than for new applicants. The former were entitled

⁷ Section 19847A superseded section 19847 when the Commission came into effect. The quoted language is identical in both sections.

⁸ Stats. 1997, c. 897, § 62(a).

⁹ Stats. 1997, c. 897, § 62(e)(1).

¹⁰ Stats. 1997, c. 897, § 62(e)(2).

¹¹ Stats. 1997, c. 897, § 62(g).

¹² Stats. 1997, c. 897, § 62(h).

to a presumption of suitability. This presumption effectively shifted the burden of proof from the applicant to the Division, which could deny a license only upon demonstrating the applicant's unsuitability. The statement in section 62(a), restated on each Certificate to Operate issued to respondent, that the provisional license created no vested right to issuance of a state gambling license, changes nothing. That statement simply notified provisional license holders that they had no property interest in a license, and that they could be denied a state gambling license even though they had been given provisional licenses. Accordingly, it is found that in this proceeding the burden of proof rests with the Division.

The Outpost

16. The Outpost is a small cardroom that has been operating in San Ramon for many years. For at least 13 years, the Outpost was owned and operated by John Schireck. Respondent purchased it from him in 1996. The premises consists of a single building of about 5000 square feet that, in addition to the gaming area, includes a bar and dining area, kitchen, and sports memorabilia shop. The Outpost is licensed to operate eight tables. It offers various poker and "Asian" games. On its busiest days, the casino might have 300 to 400 customers during a 24-hour period.

Respondent's Background

17. Respondent is 42 years old. He graduated from San Jose State University in 1983 with a double major in finance and management. While in college, respondent was employed as an accounting clerk with Lockheed Martin. After graduation, respondent worked in sales and new business development for a number of companies in the pharmaceutical/health care technology field.

18. In 1993, respondent purchased a beverage and vending machine company that operated about 300 machines in industrial and commercial locations. Before he sold the business in 1996, respondent bought several other vendors and expanded his company's size.

19. A life-long card player, respondent was a patron of the Outpost, which was only a few miles from his home. Respondent believed the Outpost's owner, Schireck, was not fully utilizing the cardroom's potential. When Schireck offered to sell him the casino, respondent felt it was a good business opportunity. Respondent purchased the business from Schireck in 1996. Schireck retained ownership of the real property, which he leased to respondent. The ten-year lease provided an option for an additional ten years and respondent's right to exercise an option to purchase should Schireck decide to sell the property.

20. Respondent had no prior experience in owning or operating a cardroom. His agreement with Schireck called for the former owner to remain on-site for a period of time, which would serve as a training period for respondent. Respondent took over Schireck's operations "as-is." He simply continued doing business in the way he understood Schireck

had been operating the club. Respondent's first day of operation at the Outpost was December 12, 1996.

Findings on the Allegations

Extension of Credit

21. San Ramon Ordinance section B1-32F prohibits a cardroom owner from extending credit to players.¹³ Respondent violated that ordinance by extending credit to numerous patrons.

22. Continuing a practice he inherited from Schireck, respondent allowed customers to accumulate "tabs," or outstanding debts to the casino. Although respondent maintained that the policy was to require patrons to clear their tabs at the end of each day, the evidence showed this practice was not followed. As of March 19, 2000, approximately 120 customers had outstanding tabs of anywhere between \$40 and \$19,000. The total due to the casino on that date was \$152,585. Some of these tabs had been accumulating since early 1998.

23. Although respondent claimed that each of the customer tabs was secured by a customer check, this was not the case. On some occasions, respondent did have customers sign a document, created by Schireck, named "Customer's Check." But while this document did have spaces to record the customer's bank and bank account information, this was generally not completed. The customers were not required to write their own checks to the casino to secure their tabs.

24. That these tabs were considered "credit" by the casino is clear from its own internal documents, which refer to extending or denying customers additional "credit." The fact that respondent did not charge interest on his customers' tabs is irrelevant. Respondent repeatedly extended credit to customers in violation of the San Ramon ordinance.

25. Respondent testified he has changed his "tab" system. Now, all sums shown on "customer checks" must be cleared—either by cash or a personal check—before the patron leaves the casino. There is no evidence respondent is not following this practice.

//
//

¹³ The ordinance provides, "No licensee, owner, manager or employee or any other person associated with, employed by, or acting as agent for, any cardroom licensed by this chapter, will engage in lending of money, chips, tokens or anything of value, either real or promised, to any customer, player or any person for the purpose of allowing that person to eat, drink, or play cards within said cardroom. . . . This section shall not prohibit the cashing of checks or the use of credit cards."

Cardroom Employee Without Valid Work Permit

26. Business and Professions Code section 19910.5A and San Ramon Ordinance section B1-7B require that all employees have a work permit issued by the San Ramon Police Department. Respondent violated these sections between February and March 2000 when Hai Huynh acted as an employee at the Outpost without having the required work permit.

27. San Ramon Ordinance B1-1 provides that a "cardroom employee" includes "a supervisor" of the cardroom's operation. Despite respondent's testimony to the contrary, the evidence established that Huynh had the authority to hire and fire employees in the Asian game section of the Outpost. When he was at the casino, Huynh was observed directing other employees, going into and out of both the main cashier's cage and the portable cage in the Asian game room, cashing checks and exchanging chips for money. Respondent maintains Huynh was not an employee, but was a consultant engaged to help set up the Asian games, and that Huynh was never on the Outpost's payroll. But even though Huynh was not on respondent's payroll, because of the supervisory role he was allowed to play in the operation of the casino he was an employee within the meaning of the San Ramon ordinance. As such, he was required to have a work permit from the San Ramon Police Department.

Illegal Lotteries

28. Penal Code section 319 defines a lottery as: "[A]ny scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it . . . upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known." Penal Code section 320 makes it illegal to set up or offer any lottery in California. Respondent has violated section 320 on a number of occasions.

29. On February 29, 2000, respondent submitted a bi-annual gaming activity report in which he described the gaming activities conducted at the Outpost during the preceding six months. Included in the report was information about a Double Hand Poker "Rolex Giveaway," an Omaha "Bad Beat Jackpot" and a Hold 'em "Bad Beat Jackpot." According to information submitted by respondent, a Rolex watch was given to the Double Hand Poker player who collected the most points at the end of four hours of play. On each deal, the player receiving the highest up front hand received one point. Players were charged the Outpost's "standard collection rates" to play in the game. In order to qualify for the watch, each player had to buy into the game for \$10,000. In the Omaha and Hold 'em Bad Beat Jackpots, a jackpot was awarded to a player holding a specific poker hand that was beaten by a better hand. Respondent had not requested prior approval from the Division to run any of these promotions. Respondent ran Bad Beat Jackpots from sometime in 1998 until March 2000.

The elements of chance, consideration and prize existed for all of these promotions. All were illegal lotteries. While respondent argued that the Bad Beat Jackpots could not be lotteries because they were based on Omaha and Hold 'em, games of skill rather than chance, the court in *Bell Gardens Bicycle Club v. Department of Justice*¹⁴ held otherwise. Bad Beat Jackpots are simply games of chance appended to otherwise legal games and if consideration exists, they are illegal lotteries. Here, consideration existed. While respondent maintained at the hearing that players could get free hands in order to qualify for the Bad Beat Jackpot, this was not completely true. Even though a player could enter the game "behind the blind" and thus see his hand for free, in order to stay in the game long enough to qualify for the Bad Beat Jackpot, a player would have to place a bet. Unlike some larger clubs offering Bad Beat Jackpots, the Outpost did not provide free instructional tables at which someone might qualify for the jackpot without putting up any money.

Months before he stopped running Bad Beat Jackpots, respondent had been warned that a similar promotion might have constituted an illegal lottery. In November 1999, the Division provided respondent a copy of Penal Code section 319 and advised him that a "High Hand Bonus" respondent was offering in connection with Omaha and Hold 'em games appeared to be an illegal lottery. Respondent agreed to stop offering that promotion. But the Bad Beat Jackpot promotions continued. In continuing his Bad Beat Jackpots, respondent was influenced by advertisements he had seen in industry-related publications showing that a number of large casinos offered this promotion.

30. In February 2000, respondent held a raffle to give away a new Jeep. Although the Division maintains that patrons could obtain tickets for the raffle only by paying to play at the casino, evidence on this point is conflicting. Respondent submitted credible evidence that free entries were given away at the casino. The Division failed to carry its burden of proof that the Jeep raffle was an illegal lottery.

Banked Games

31. "Banked" or "banking" games have long been prohibited in California. Penal Code section 330 provides that, "Every person who deals, plays, or carries on, . . . or conducts, either as owner or employee . . . any banking or percentage game played with cards, . . . and every person who plays or bets at or against any one of those prohibited games, is guilty of a misdemeanor, . . ." Until September 2000, there was no statutory definition of a banked game. However, through case law the term did come to have "a fixed and accepted meaning: the 'house' or 'bank' is a participant in the game, taking on all comers, paying all winners, and collecting from all losers."¹⁵ It is a game in which a person or entity participates in the action as "the one against the many," paying all winners and collecting from all losers through a fund generally called the "bank." The banker pays off all

¹⁴ (1995) 36 Cal.App.4th 717.

¹⁵ *Sullivan v. Fox* (1987) 189 Cal.App.3d 673, 678.

winning wagers and keeps all losing wagers. The banker competes against the other participants in the game and therefore has an interest in the game's outcome.¹⁶

32. Some "California-style banked games" are legal. For instance, one of the banking games specifically named in Penal Code section 330 as prohibited in California is twenty-one. As this game is typically played in a Nevada-style casino for example, the casino ("the house") acts as banker for all hands, collecting from all the losers and paying all the winners. However, a version of twenty-one is legal in California. This version of the game features a "player-dealer" position that is rotated among each of the participants in the game. The house does not act as "the one against the many." Instead, each player has the opportunity to act as the banker for a particular hand, risking his stake against the bets of the other players. Typically, a button is used to designate the player-dealer. The button is placed in front of the participant acting as player-dealer for a particular hand.

33. Among the games played at the Outpost were pai gow and "No Bust 21st Century Blackjack." The rules for these games were reviewed by the Division. They were found not to violate Penal Code section 330 because they were not banked games. Pai gow also uses a button to designate the player-dealer. In both blackjack and pai gow, the button rotates around the table. A player can decline the button. No player can maintain the button for more than two consecutive hands.

34. It is undisputed that on a number of occasions between February 18 and March 1, 2000, respondent played pai gow or blackjack at the Outpost. On each occasion, he acted as the player-dealer, accepting "the button" when it came to him. The Division asserts that by doing so, respondent thereby conducted a banked game in violation of Penal Code section 330.

35. The Division's assertion cannot be accepted. The mere fact that respondent, the owner of the casino, participated in legal games in his own casino, acting from time to time as the player-dealer, did not convert those legal games into forbidden banked games.¹⁷ Although statutory law now prohibits a casino owner from occupying the player-dealer position, at the time respondent played in these games neither statutory nor case law contained such a prohibition. Business and Professions Code section 19805(c) and Penal Code section 330.11 both became effective September 30, 2000. Using identical language, those statutes codified case law holding that banked games do not include games using a continuously and systematically rotating player-dealer system. While those sections also provide, that "the house shall not occupy the player-dealer position," this was not the law in February and March 2000.

¹⁶ See, generally, *Hotel Employees & Restaurant Employees International Union v. Gray Davis* (1999) 21 Cal.4th 585, 592-593. All internal citations omitted.

¹⁷ See *People v. Ambrose* (1953) 122 Cal.App.2d Supp. 966, 970.

36. It was not established that by acting as a player-dealer, respondent conducted banked games in violation of Penal Code section 330.

37. The Division asserts that well before he was observed acting as a player-dealer in February and March 2000, respondent had been specifically advised that he could not do so. Division agent Richard Sinor testified that on June 3, 1999, he advised respondent that it was a violation of Penal Code section 330 for him, as owner of the casino, to act as a banker in his own club. But no record of this admonition was included in the investigative report completed by Division agent Glenn Allen regarding the visit of that date. Nor was Sinor's testimony corroborated by Allen. Respondent denies Sinor told him not to act as player-dealer. By itself, Sinor's testimony is insufficient to establish by a preponderance of the evidence that in June 1999 respondent was warned not to act as a player-dealer.

38. Respondent testified that on March 17, 2000, Division agent Greg Howard told him he was not to act as player-dealer in his own casino. Since that date, he has not done so.

False Statements

39. Business and Professions Code 19854A(a) provides that an applicant for a gambling license "shall make full and true disclosure of all information to the division and the commission necessary to carry out the policies of this state relating to licensing, registration, and control of gambling."

40. Employment of Hai Huynh. Division investigators interviewed respondent on March 17, 2000. Respondent told the investigators that Hai Huynh was not an employee of the Outpost, that he was simply developing a game for use there. Respondent said that Huynh did not work at the casino and had been there only "several times." This was not completely true. Huynh had actually been coming to the casino three times a week for about six or seven weeks, and he had been granted authority to hire and fire employees in the Asian game section of the Outpost, to access the main and portable cashier's cages, and to exchange chips for money. Respondent thereby violated Business and Professions Code section 19854A(a) by failing to make a full and complete disclosure of Huynh's role in the operation of the casino.

41. Employee - Prop Player Hiring Practices. In the March 17, 2000 interview, respondent told the investigators that proposition ("prop") players were only used in poker games, that they were on the payroll, and that they punched in like other employees. These statements were false. Respondent's records show that prop players were not "on the clock" and were paid from the cage, not on the payroll. At the hearing, respondent conceded that he had used prop players in the Asian games, as well as poker games, beginning in early February, 2000, when he hired Sonny Nguyen to help run the Asian games. A violation of Business and Professions Code section 19854A(a) was established.

Respondent also told the investigators on March 17, 2000 that Sonny Nguyen was the manager of the Asian games at the casino but did not have authority to hire employees without respondent. This statement was also false. In February 2000, Nguyen engaged a Division undercover agent to be a prop player in the Asian games at the Outpost. Nguyen told the agent he needed to check with his "boss," Hai Huynh, to see if he could hire him. Later, when playing as a prop player at the same table with respondent, the agent told respondent that Sonny Nguyen had hired him. Respondent did not indicate he had been involved in the hiring decision in any way. The weight of the evidence shows that Nguyen and Huynh had authority to hire employees in the Asian games without respondent's involvement. A violation of Business and Professions Code section 19854A(a) was established.

42. Bank Games. While it is true that respondent's personal gaming losses at the casino were written off as promotional expenses, it was not shown that respondent falsely represented to the investigators at the March 17, 2000 interview that his losses were instead made up each month from his personal account. A review of the transcript of the interview shows that the discussion about this topic was disjointed and fragmented. Respondent began to say that his accountant picks up any deficit at the end of the month, and that there is a separate line item for it. He was then interrupted by an investigator asking, "[Y]ou make that up out of your own bank account?," to which respondent answered, "Oh, absolutely." But respondent then continued with his explanation and said, "At the end, it comes out . . . absolutely. It's an expense. . . ." From this exchange it cannot be found that respondent misrepresented how his personal losses were made up. His explanation was, at worst, inconsistent. But it was not false. In another interview conducted on March 30, 2000, the topic was again explored, this time in more depth. At that interview respondent made clear that his personal losses were "rolled up" as "a business expense on the promotional side." No violation of Business and Professions Code section 19854A(a) was established.

43. Gaming Activity Report. On his Gaming Activity Report submitted on February 29, 2000, respondent reported that "no purchase [was] necessary" to be eligible to win the Jeep in the drawing held that month (referred to in Finding 30, above). It was established this was a false statement. As set forth above, respondent presented credible evidence that free entries were given away at the casino and the Division did not have sufficient evidence to make a finding otherwise. No violation of Business and Professions Code section 19854A(a) was established.

44. Employee List. Hai Huynh began working at the Outpost in late

employment. A violation of Business and Professions Code section 19854A(a) was established.

45. Sonny Nguyen was last employed at the Outpost on August 31, 2001. Therefore, respondent's failure to include Nguyen on a list of employees submitted to the Division on September 17, 2001 did not constitute a false statement. No violation of Business and Professions Code section 19854A(a) was established.

46. Litigation History. On his application for a State Gambling License signed in January 1999, respondent checked "no" to Question 9L, "Have you . . . ever been a party to a lawsuit either as a plaintiff or defendant . . . ?" This statement was not true. In fact, in August 1998, respondent had filed a civil suit against his landlord and former Outpost owner, John Schireck. That lawsuit was first revealed to the Division in August 2000, when respondent's attorney mentioned it in a letter sent to complainant. The lawsuit in question involved respondent's lease agreement with Schireck.

Respondent attempted to explain his failure to reveal the lawsuit in a number of ways. He theorizes that because he had answered the previous series of questions as "N/A," he had just fallen into a "not applicable mode" and therefore answered the litigation question incorrectly. He also theorized that he misread the question to begin "Are you . . ." rather than "Have you . . ." and, because he was not in litigation at the time, answered the question incorrectly. But the litigation between respondent and Schireck was a "bitter" dispute resolved by a settlement in respondent's favor in mid-1999. Thus, the litigation was, in fact, going on at the time respondent completed his application.

It does appear, however, that respondent's failure to disclose the lawsuit in his application was not with the intention of misleading the Division, but rather was due to carelessness and inattention to details. Nevertheless, respondent failed to make full and complete disclosure on his application of a then-active lawsuit of which he was clearly aware. Respondent thereby violated Business and Professions Code section 19854A(a).

Compliance with Local Ordinance

47. As set forth in Findings 21-24, by granting credit to patrons, respondent violated San Ramon Ordinance B1-32F. He thereby violated Business and Professions Code section 19917A, which provides that "No owner licensee shall operate a gambling enterprise in violation of any governing local ordinance."

Regulation Violation

48. Title 11, California Code of Regulations section 2050(a) requires that a gambling establishment shall have on the premises at all times that it is open to the public an owner licensee or a "key employee" with authority to insure compliance with the Gambling Control Act and regulations. Respondent violated this section on March 23, 2000, when the Outpost was open for business from at least 12:15 p.m. until about 4:15 p.m. without an

owner licensee or key employee being present. Although respondent testified that he had left the casino to take care of personal business and that the key employee on staff that day, Bob Medeiros, went home sick, this testimony is contradicted by respondent's explanation in a September 29, 2000 letter to the Division from his attorney. In that letter, respondent maintained that the key employee on staff that day was Doug Leal, and that Leal was present at the time agents from the Division were at the casino.

49. Respondent testified he has changed his practices to avoid a similar situation occurring again; he has named all his floor managers as key employees. As a result, there has not been another incident in which the casino was left without a key employee on duty.

Other Matters

50. Respondent maintains that the allegations against him are the result of false allegations made by the former Outpost owner, John Schireck, and Schireck's attorney, in an attempt to regain control of the real property on which the casino is located, so that Schireck can sell that property to a hotel developer.

51. The Outpost has a clean record with the San Ramon Police Department. The casino has been a "fairly quiet" location that has not produced a great number of calls for service. Respondent has maintained a good relationship with the police department. The casino has generally been a "good citizen" of San Ramon

52. In 1999, an individual approached respondent seeking to install a form of slot machine at the Outpost. Respondent called the Division to find out if the machine was legal. When informed the machine was illegal, respondent assisted the Division by cooperating in an undercover "sting" operation related to the machines.

53. Even when asked a direct question, respondent has a tendency to ramble on, often taking diversions into marginally related, or unrelated, topics. His attorney colorfully describes this tendency as "ebullient, unguarded loquacity." Respondent's inability to remain focused on specific questions asked him was apparent both at the hearing and in the transcript of the March 17, 2000 interview that is the source of several of the false statement allegations.

LEGAL CONCLUSIONS

1. Business and Professions Code section 19848A provides that a gambling license shall not be issued unless the commission is satisfied that the applicant is both:

(a) "A person of good character, honesty and integrity" and

(b) "A person whose prior activities, . . . , reputation, habits, and associations do not pose a threat to the public interest of this state, or to the effective regulation and control of controlled gambling, or create or enhance the dangers of unsuitable, unfair, or illegal

practices, methods, and activities in the conduct of controlled gambling or in the carrying on of the business and financial arrangements incidental thereto."

2. Business and Professions Code section 19850A(a)(2) provides that the commission shall deny a gambling license for "failure . . . to reveal any fact material to qualification, or the supplying of information that is untrue or misleading as to a material fact pertaining to the qualification criteria."

3. Cause to deny respondent's application for a gambling license exists pursuant to the foregoing provisions of the GCA. Respondent violated the San Ramon ordinance prohibiting extending credit to patrons. (Findings 24 and 47.) He permitted Hai Huynh to act as an employee without having the required work permit. (Finding 27.) He ran promotions that violated the prohibition against lotteries. (Finding 29.) He made false statements to Division investigators. (Findings 40 and 41.) He failed to make full and complete disclosure of Sonny Nguyen's employment and about his own litigation history. (Findings 44 and 46.) And he violated the regulation requiring that a licensee owner or a key employee be on the premises at all times it is open for business. (Finding 48.)

4. However, mitigating circumstances do exist. In violating the ordinance prohibiting credit, respondent was continuing a long-standing practice of the former owner. There was no evidence that the City of San Ramon objected to this practice, either to Schireck or to respondent. Respondent has now changed the practice. Although Hai Huynh was permitted to act as an employee without a work permit, this was a fairly technical violation since Huynh, while given the authority of an employee, was never on respondent's payroll. Respondent ran Bad Beat Jackpot-type promotions after seeing other clubs do so. His promotions were illegal only because he failed to offer the free plays that larger clubs provide. The violation of the key employee regulation appears to have been a one-time occurrence, and respondent has taken steps to prevent it from happening again. Although the failure to include Sonny Nguyen on a February 29, 2000 roster submission to the Department was characterized as a false statement, in reality it was a paperwork violation. And while respondent did fail to disclose his litigation with Schireck on his gambling license application, this was not done with the intent to mislead the Division, but rather was due to carelessness.

5. The findings of greatest concern are those relating to the March 17, 2000 interview with Division investigators and respondent's honesty. Respondent minimized the number of times Hai Huynh was coming to the casino, he misstated how prop players were paid, and he did not fully disclose Sonny Nguyen's authority. Even if these false statements could be blamed on respondent's "ebullient, unguarded loquacity," he was nevertheless not entirely candid with the investigators. Honesty and integrity are necessary requirements for a gambling licensee. By his misstatements, respondent has caused the Division to have legitimate questions about his honesty.

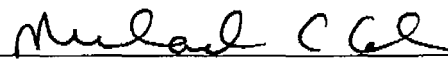
6. However, upon a consideration of all the evidence in the case, it is determined that it would not be against the public interest to permit respondent to hold an appropriately conditioned gambling license to operate the Outpost. In making this determination, the evidence of respondent's wrongdoing and the questions about respondent's honesty have been balanced with the mitigating circumstances discussed above, the length of time respondent has held a gambling registration/provisional license, respondent's good record with the City of San Ramon, and respondent's cooperation with the Division in a sting operation. Respondent must understand, however, that he must be meticulous and careful with the operation of the Outpost and in his dealings with the Division. Future violations of the GCA, Division regulations and/or San Ramon ordinances will not be tolerated.

ORDER

The application of respondent Mark S. Luciano for a gambling license to operate the Outpost Casino is denied and the provisional license currently held by respondent is terminated. However, the denial is stayed for two (2) years and, pursuant to Business and Professions Code section 19858A(b), respondent is granted a gambling license subject to the following terms and conditions:

1. Respondent shall comply with all laws, rules, regulations and ordinances governing controlled gambling in the State of California and in the City of San Ramon.
2. Should it be found, after notice and an opportunity for hearing, that respondent has violated the foregoing condition, respondent's license may be revoked or otherwise disciplined as determined by the Commission.
3. Any license issued to respondent during a period of two (2) years shall be issued subject to the foregoing conditions, and then only if it is determined that respondent has fully complied with those conditions.

DATED: January 2, 2003


MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
CALIFORNIA GAMBLING CONTROL COMMISSION
STATE OF CALIFORNIA

In the Matter of the Statement of Issues and
Termination of Provisional License Against:

File No. S02-01

OAH No. N-2002040146

MARK S. LUCIANO
Outpost Casino Sports Bar and Restaurant
251 San Ramon Valley Drive
San Ramon, CA 94583

Respondent.

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby
adopted by the CALIFORNIA GAMBLING CONTROL COMMISSION as its Decision in
the above-entitled matter.

This Decision shall become effective on _____.

IT IS SO ORDERED _____.